No. 17-1042

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

MICHAEL D. LOOS,

Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a railroad's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding below.

Pursuant to Supreme Court Rule 29.6, the undersigned counsel states that BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. Berkshire Hathaway Inc. owns 10% or more of National Indemnity Company.

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INTRODUCTION

Railroad employees participate in a separate retirement system governed by two federal statutes. The Railroad Retirement Act (RRA) determines the benefits to be paid, based on employee "compensation." The Railroad Retirement Tax Act (RRTA) funds those benefits by imposing taxes, also based on employee "compensation." These statutes represent two sides of the same coin: the RRA is the expenditure side, and the RRTA is the revenue side. *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1989).

In this case, however, the court of appeals held that a jury award for lost wages would not be taxable as compensation under the RRTA, even though it could be considered as compensation for purposes of benefits under the RRA. The court's decision is inconsistent with the statutory text as illuminated by this Court's decisions, with the statutory context created by the two parallel statutes, and with decades of interpretation by the responsible federal agencies.

The amount directly at stake in this case is limited. But the principle is an important one. If employees can receive payments that increase their benefits but do not count toward their taxes, the system is asymmetrical and inherently unstable. The nation's railroads have a long-term interest in the stability and adequate funding of the rail retirement system.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 865 F.3d 1106 and reprinted in the appendix attached to the petition ("Pet.App.") at 1a–24a. The Eighth Circuit's order denying rehearing or rehearing en banc (Pet.App. 31a-32a) is not reported. The opinion of the district court is unpublished. (Pet.App. 25a–30a.)

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Eighth Circuit entered its judgment on August 3, 2017 and denied BNSF's timely petition for rehearing or rehearing en banc on October 26, 2017. BNSF filed a timely petition for certiorari on January 23, 2018. This Court granted certiorari review on May 14, 2018.

STATEMENT

A. Railroad Retirement System

In the 1930s, Congress established the Railroad Retirement system, which remains separate from Social Security today.[1] "The Railroad Retirement Act, . . . provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573 (1979). The legislation to manage this system consists primarily of two federal statutes.

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[1] *See* 42 U.S.C. § 410(a)(9); *Wisconsin Cent. Ltd. v United States*, 138 S. Ct. 2067, 2070 (2018).

The Railroad Retirement Act sets the benefit levels. "In its modern form, the Act resembles both a private pension program and a social welfare plan. It provides two tiers of benefits." *Hisquierdo*, 439 U.S. at 574. Tier I benefits take the place of Social Security, from which railroad workers are exempt, and Tier II benefits are similar to those that workers would receive from a private multi-employer pension fund. *Id.* The benefits are computed based on the length of time for which the employee receives "compensation" from the employer.[2] Benefits for railroad employees include payments for sickness or disability that may arise from a workplace injury.[3]

The Railroad Retirement Tax Act sets the payroll taxes to fund these benefits. *Hisquierdo*, 439 U.S. at 574.[4] The payroll taxes are imposed on both the railroad employer and employee. *Id.* They are divided into Tier I and Tier II taxes and are measured by the amount of the employee's "compensation." *See* 26 U.S.C. § 3201 (employee rate

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[2] *See, e.g.*, 45 U.S.C. § 231a(a)(1) (describing eligibility for both retirement and disability benefits); 45 U.S.C. § 231a(b) (describing eligibility for supplemental retirement benefits); 45 U.S.C. § 231b (computing benefits).

[3] *See* 45 U.S.C. § 352 (sickness benefits); 45 U.S.C. § 231a (disability benefits and occupational disability benefits). *See also Eichel v. New York Cent. R. Co.*, 375 U.S. 253, 255 (1963) (in negligence suit arising from workplace injury, the trial court properly excluded evidence that the employee was receiving an occupational disability annuity under the RRA).

[4] In its original form, the RRTA was known as the Carriers Taxing Act, 50 Stat. 435 (1937). Since 1946, it has been called the Railroad Retirement Tax Act.

of tax); 26 U.S.C. § 3221 (employer rate of tax).[5] The railroad employer withholds the payroll taxes from the employee's earnings and pays them over to the IRS. 26 U.S.C. § 3202(a). The employee does not take this money home. 26 U.S.C. § 7501; 26 C.F.R. § 31.3202-1.

These statutes are administered by two federal agencies. The Railroad Retirement Board (RRB), an independent agency within the executive branch, administers the benefit program under the Railroad Retirement Act. *See* 45 U.S.C. § 231f; 20 C.F.R. § 200.1(a)(3). The Internal Revenue Service (IRS) is assigned the responsibility of collecting revenues under the Railroad Retirement Tax Act. 26 U.S.C. § 7801; 20 C.F.R. § 200.1(a)(3). Congress vested the RRB with authority to work in coordination with the IRS to ensure that the railroad employers are properly paying the taxes that fund the benefit programs.[6]

Congress directed the Secretary of Treasury to "prescribe all needful rules and regulations for the enforcement of [Title 26]. . . ." 26 U.S.C. § 7805; *see also United States v. Correll*, 389 U.S. 299, 306–07 (1967).

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[5] For example, the employee payroll taxes in 2017 were: Tier I—6.2 percent (maximum earnings taxed is $127,200); Tier II—4.9 percent (maximum earnings taxed is $94,500).

[6] 45 U.S.C. § 231f(b)(6) (RRB has power to require all employers to furnish such information and records as shall be necessary for the administration of the Act); 45 U.S.C. § 231h (RRB may require employers to file compensation reports).

B. Statutory Definition of "Compensation"

The benefits and taxes under the railroad retirement scheme are predicated on the employee's "compensation." *See* 26 U.S.C. §§ 3201(a), (b) (employee rate of tax); 26 U.S.C. §§ 3221(a), (b) (employer rate of tax); 45 U.S.C. § 231b (computation of annuities).

"Compensation" is a defined term in both the RRA and RRTA.[7] At the outset in 1935, the taxing act defined "compensation" as "any form of money remuneration for active service *received by* an employee from a carrier, including salaries and commissions . . . ." Act of Aug. 20, 1935, Pub. L. No. 400, § 1, 49 Stat. 974 (Aug. 29, 1935) (emphasis added).[8]

Beginning in 1937, Congress dropped the requirement of "active" service. *See* Carriers Taxing

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[7] The original 1934 Railroad Retirement Act used the term "compensation," without further definition. 48 Stat. 1283 (1934). After this Court declared that act unconstitutional, (*Railroad Retirement Board v. Alton Railroad Company*, 295 U.S. 330 (1935)), Congress separated the taxing and benefit statutes. *See* Railroad Retirement Act of 1935, 49 Stat. 967, and the Carriers Taxing Act of 1935, 49 Stat. 974.

[8] The 1935 Act was enjoined as unconstitutional by a district court (*Alton Railroad Co. v. R.R. Retirement Bd.*, 16 F. Supp. 955 (D. D.C. 1936)), but that litigation was withdrawn after labor-management negotiations resulted in a memorandum of agreement, the principles of which became the Railroad Retirement Act of 1937.

Act of 1937, Pub. L. No. 174, § 1 (June 20, 1937).[9] Congress also changed the timing rules for when the taxes are assessed. *See id.* According to the Senate report, the new "phraseology makes clear that what is significant is that compensation has been *earned by* the employee, not that it has been *actually received* by him."[10] Through an "including" paragraph, Congress introduced special rules for payments made to an employee for lost time from work. The RRTA definition provided:

> The term 'compensation' means any form of money remuneration *earned by* an individual for services rendered as an employee to one or more employers . . . *including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.*

26 U.S.C. § 1532(e) (Supp. V 1939) (emphasis added). The Railroad Retirement Act of 1937 contained identical language in its definition of compensation. 45 U.S.C. § 231(h) (Supp. V 1939).

In 1946, Congress added a second paragraph to the definition of "compensation." Pub. L. 572, § 1, 60 Stat. 722 (July 31, 1946). This new paragraph began by stating that an employer's payment through the

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[9] In its original form, the RRTA was known as the Carriers Taxing Act, 50 Stat. 435 (1937). Since 1946, it has been called the Railroad Retirement Tax Act.

[10] S. Rep. No. 818, 75th Cong., 1st Sess. 4 (1937), *reprinted in* 1939–2 C.B. 629, 632 (emphasis added).

employee payroll shall be deemed to be compensation for services rendered. *See id.* at § 2. 26 U.S.C. § 1532(e) (1946). In relevant part, it then stated:

> An employee shall be deemed to be paid 'for time lost' the amount he is paid by an employer with respect to an *identifiable period of absence from the active service of the employer*, including absence *on account of personal injury* . . . .

26 U.S.C. § 1532(e) (1946) (emphasis added).[11] The RRA, as amended, contained identical language. 45 U.S.C. § 231(h) (1946).

In 1975, Congress moved from assessing taxes based on when money remuneration is *earned by* an employee to assessing taxes based on when he or she is *paid*. See Pub. L. 94-93 § 204 (Aug. 9, 1975).[12] Congress also removed the special rules for time-lost payments that were part of the "earned" concept added in 1937. *Id.* As revised, the first sentence of compensation in the RRTA stated: "The term 'compensation' means any form of money remuneration *paid to* an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e) (emphasis added).

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[11] It further provided that the total payment "shall be deemed" pay for time lost unless specifically apportioned to factors other than time lost. *Id.*

[12] This change from "earned" to "paid" had already been made in the RRA's definition of compensation when Congress completely restructured the RRA in 1974. *See* 45 U.S.C. § 231(h) (1974).

Congress amended the RRTA's definition of compensation in 1976, 1981, and 1982, making changes to the substantive rule and adding exclusions.[13] Congress left intact the references to time-lost payments in the second paragraph of the RRTA's definition of compensation.

In 1983, Congress shifted the definition of compensation from a monthly wage basis to an annualized wage basis. *See* Pub. L. 98-76, § 225 – Technical Amendments (Aug. 12, 1983). As part of this amendment, Congress removed the second paragraph in the RRTA's definition of "compensation" in its entirety. Congress inserted in its place rules about payments in excess of base compensation. *See id.* at § 225(a)(1).[14] This 1983 amendment removed the last references to pay for time lost in the RRTA's definition of compensation.

Today, the RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more

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[13] In 1976, for example, Congress excluded certain types of time-lost payments—*i.e.*, disability or sickness payments under an employer plan—from the definition of compensation. 26 U.S.C. § 3231(e)(1)(j) (1976). In 1981, Congress made changes to the second paragraph of the RRTA's definition of compensation to address the rules for retroactive payments. 26 U.S.C. § 3231(e)(2) (1981). *See also* Pub. L. 97-123, 1982-1 C.B. 314 (Jan. 1, 1982) (adding an exemption (4)(A) & (B) to the RRTA definition of compensation).

[14] Specifically, Congress inserted in a substitute provision that excludes compensation in excess of "applicable base," defines the applicable base, and provides for the applicability of successor employer provisions. *Id.*

employers." 26 U.S.C. § 3231(e) (Pet.App. 33a). The RRTA contains a detailed list of exclusions from the definition. *See id.* The RRA defines "compensation" as any form of "money remuneration paid to an individual for services rendered as an employee to one or more employers . . . including remuneration paid for time lost as an employee . . . ." 45 U.S.C. § 231(h)(1) (Pet.App. 41a). It further provides that an "employee shall be deemed to be paid 'for time lost' the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury . . . ." 45 U.S.C. § 231(h)(2) (Pet.App. 41a.)

C. The Interpretations of Federal Agencies

The IRS administers the RRTA and has promulgated regulations defining compensation through its authority under 26 U.S.C. § 7805. Since 1938, the IRS regulation has consistently defined taxable "compensation" as "not confined to amounts paid or earned for active service but includ[ing] amounts earned or paid for periods during which the employee or employee representative is absent from the active service of the employer." 26 C.F.R. § 410.5 (1938). *Compare* 26 C.F.R. § 31.3231(e)-1(a)(3) (2017) (Pet.App. 46a-47a).

In 1994, the IRS proposed regulations that included the words "pay for time lost" in the definition of compensation. *Update of Railroad Retirement Tax Act Regulations*, 59 Fed. Reg. 66188, 66188-89 (Dec. 23, 1994). One commenter suggested deleting this language since pay for time lost had been removed in 1983 from the RRTA's definition of

taxable compensation. *Id.* In rejecting this suggestion, the IRS explained that the statutory amendments affected when time-lost payments were assessed, not whether such payment were included in compensation. *See id.* Thus, the IRS concluded that time-lost payments remained in the definition of "compensation." *See id.*; *see also* 2014 Instructions for IRS Form CT-1, Employer's Annual Railroad Retirement Tax Return (J.A. 35a) (explaining that compensation "includes pay for time lost as an employee").

The Railroad Retirement Board counts payments for time lost toward the employee's creditable service. It agrees with the IRS that the definition of taxable compensation under the RRTA should be construed similarly. (Pet.App. 18a; J.A. 68a, 75a.) As the Board explained in 2005, "[t]he Office has long recognized that in view of the substantial similarity between the definitions of compensation under the RRA and RRTA, it is desirable, absent controlling language to the contrary to treat payments to employees in the same fashion under both statutes."[15] Thus, the Railroad Retirement Board stated in 2008 that "[a]s with all compensation, pay for time lost is subject to taxation under the Railroad Retirement Tax Act . . . ."[16]

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[15] U.S. Railroad Retirement Board Legal Opinion L-2005-25 at 2 (Dec. 2, 2005).

[16] U.S. Railroad Retirement Board, *Railroad Retirement Service Credits and Pay for Time Lost* at 1, 3 (May 2008). (J.A. 68a; *see also* J.A. 75a, 78a-79a.)

D. The Relevant Facts and Procedural History

The facts of this case are not in dispute. In 2013, plaintiff sued BNSF under the Federal Employers' Liability Act (FELA) to recover damages for work-related injuries. Plaintiff filed this action in Minnesota federal district court. His FELA case proceeded to trial. (Pet.App. 7a.) Following a trial, the jury returned a verdict in favor of plaintiff in the amount of $126,212.78. (Pet.App. 7a; J.A. 86a-88a.) The verdict included a line item of $30,000 in past lost wages. (Pet.App. 7a, 26a; J.A. 87a, 94a.) The district court entered the entire amount in judgment against BNSF. (Pet.App. 26a; J.A. 19a.)

BNSF filed a timely motion to amend or alter the judgment under Federal Rule of Civil Procedure 59(e). (Pet.App. 7a.) BNSF notified the court that it had paid to the IRS a total of $9990 in RRTA taxes, which consisted of the $3765 owed in payroll taxes by plaintiff and the $6234 owed in payroll taxes by BNSF for the lost wage payment. (Pet.App. 21a-23a, 29a.) BNSF submitted the RRB Form BA-4, along with an affidavit, showing that plaintiff had received four additional months of creditable compensation towards his retirement benefits for this time-lost payment. (J.A. 23a; Supplemental Appendix (SA) 4.) BNSF asked the district court to offset the judgment by $3765 to reflect plaintiff's share of taxes owed under the RRTA as a result of the lost wage award. (Pet.App. 29a.)

The district court agreed with BNSF that "FELA judgments for lost pay fall within the definition of 'compensation'" under the RRTA. (Pet.App. 29a.) However, the district court observed that personal

injury awards are exempt from income taxes under 26 U.S.C. § 104. (Pet.App. 30a.) The court believed that this exclusion for personal injury judgments should apply to the RRTA's definition of compensation as well. (Pet.App. 30a.) Accordingly, the court denied BNSF's motion for an offset.

BNSF appealed, and the United States filed an amicus brief in support of the appeal. Their briefs explained that the RRTA tax is imposed on "compensation"—a defined term in the RRTA—and that the IRS has interpreted this term to include pay for time lost. The briefs further explained that the district court was wrong to invoke 26 U.S.C. § 104, which is an exclusion applicable to a different statutory term (gross income) for a different tax (income tax). For over half of a century, the IRS has maintained that 26 U.S.C. § 104 has no bearing on the RRTA tax treatment for time lost.[17]

E. The Opinion of the Eighth Circuit

The Eighth Circuit affirmed the district court's decision in this case, though on different grounds. (Pet.App. 24a.) The court recognized that "damages for lost wages fit well within the definition of 'compensation'" under the IRS regulation, but it rejected this interpretation of the RRTA. (Pet.App. 19a-20a.) "[T]he RRTA is unambiguous and does not include damages for lost wages within the definition of 'compensation.'" (Pet.App. 24a.)

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[17] *See* Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL 12630 (Jan. 1961); IRS Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL 287177 (July 1985).

The Eighth Circuit reasoned that the RRTA defines "compensation" as remuneration paid "for services rendered as an employee." (Pet.App. 20a.) The panel construed "services rendered" to mean "services that an employee actually renders, not to services that the employee would have rendered but could not." (Pet.App. 20a.) The panel acknowledged that this Court has construed, in the social security context, the concept of payment for services performed to encompass the entire employee-employer relationship. (Pet.App. 19a-20a.)[18] However, the panel found this precedent was not applicable to the RRTA and thus gave it no weight. (Pet.App. 20a.) The Eighth Circuit concluded that "damages for lost wages do not fit within the plain meaning of the RRTA" and that the IRS "regulations providing to the contrary receive no deference under *Chevron* . . . ." (Pet.App. 20a, 24a.)

The Eighth Circuit acknowledged that the RRA defines compensation to include pay for time lost. "[B]ecause the RRA expressly considers pay for time lost in calculating benefits, it makes sense that the RRTA would tax pay for time lost to pay for those benefits." (Pet.App. 21a.) The court, however, observed that these statutes contained "linguistic" differences: "That Congress expressly included pay for time lost in the RRA's definition of 'compensation' yet omitted it from the RRTA's definition suggests

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[18] *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365–66 (1946); *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014).

that Congress did not intend the RRTA to include pay for time lost." (Pet.App. 21a.) According to the court, the statutory history "confirms" that the linguistic differences are "intentional." (Pet.App. 21a.) Thus, the Eighth Circuit ruled that the lost-wages award was not subject to payroll taxes under the RRTA. (Pet.App. 23a-24a.)

BNSF filed a timely petition for rehearing and rehearing en banc. BNSF explained that the panel's ruling conflicted with decisions of other state and federal courts. The Eighth Circuit denied rehearing.

SUMMARY OF ARGUMENT

In its last Term, this Court addressed an issue of interpretation of the term "compensation" in the RRTA. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067 (2018). The Court looked to the immediate text, the broader context, and the contemporaneous views of the IRS. In this case, each of these tools of interpretation points to the same result: pay for time lost is taxable compensation under the RRTA.

First, Congress chose to define compensation broadly as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e). This Court has interpreted similar language–"service . . . performed"–and concluded that it covers lost wages regardless of whether services have been actually performed. *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358 (1946); *United States v. Quality Stores*, 134 S. Ct. 1395 (2014). The Eighth Circuit restricted the scope of compensation to services "actually" performed, but there is no such restriction in the

statutory language. Worse still, the Eighth Circuit's interpretation would render other parts of the definition superfluous. Congress carefully crafted exclusions for only certain types of time-lost payments from the definition of compensation. The Eighth Circuit's interpretation conflicts with that deliberate decision.

Second, the meaning of "compensation" in the RRTA is clarified by the more detailed definition of the same term in the companion statute, the RRA. That statute was enacted in the same week, addressed the same subject, and used the same term ("compensation"). Both statutes have the same key definition of compensation ("any form of money remuneration paid to an individual for services rendered as an employee"), but the RRA discusses an example of such compensation ("including remuneration paid for time lost as an employee"). Because the two statutes should be read *in pari materia*, that illustration of the meaning of compensation should apply to both. This assures that payments used to compute benefits will also be used to compute taxes.

Third, the history confirms that Congress intended to have equivalence in the benefits and taxing provisions. It shows that deletion of the time-lost language from the RRTA's definition of "compensation" in 1975 was not intended to exempt such payments from taxation, but to serve another purpose. The time-lost illustration was initially inserted into the statute to address the problem of when pay for time lost was "earned" under the statute. When the statutory standard was changed

from "earned" to "paid," it was no longer necessary to define when lost pay was earned in the RRTA. The legislative history of the 1975 amendment shows that Congress made this change so that the procedures for benefits and taxes would be consistent. Both courts and the IRS examined the history shortly after the 1983 amendment and found no intent to change the substantive rule with regard to pay for time lost.

Based on all of these circumstances, it is clear that the RRTA subjects pay for time lost to taxation. If there were any doubt, the views of the responsible agencies would be helpful in resolving it. The IRS regulations have provided for 80 years that "[t]he term [compensation] is not confined to amounts earned or paid for active service but includes amounts earned or paid for periods during which the employee . . . is absent from active service." 26 C.F.R. § 410.5 (1938). The regulation in effect today specifically refers to pay for time lost in the definition. 26 C.F.R. § 31.3231(e)-1(a)(4) (Pet.App. 18). The Railroad Retirement Board takes the same view, and so advises railroad employees. For years, these federal agencies have distributed pamphlets and forms to the railroads and their employees explaining that pay for time lost is taxable under the RRTA. Thus, every available tool of interpretation confirms that "compensation" under the RRTA includes pay for lost time.

With the meaning of "compensation" clear, Respondent Loos has taken a different tack. He insists that BNSF's payment of lost wages falls under an exclusion—26 U.S.C. § 104(a)(2). Section

104, however, is an exclusion from a different term ("gross income") for purposes of a different tax (income tax). Congress chose the term "compensation" as the base for measuring a railroad employee's tax obligations under the RRTA and separately defined that term. Congress expressly incorporated only certain exclusions applicable to gross income into the definition of "compensation." Significantly, Section 104 is not one of them. That omission should be respected. Thus, Respondent's argument about the Section 104 exclusion fails because it is contrary to the statutory text, structure, and history.

ARGUMENT

I. The RRTA's Definition Of Taxable Compensation Includes Pay For Time Lost

The threshold issue before this Court is whether the RRTA's definition of taxable compensation includes pay for time lost. The statutory text, context, and history all show that Congress intended to include payments for time lost in taxable compensation under the RRTA. It is therefore hardly surprising that virtually every court to consider this issue has answered in the affirmative.

A. The Statutory Text

Statutory interpretation begins with the text. *See Wisconsin Cent.*, 138 S. Ct. at 2070. The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e) (Pet.App. 33a). Payments for time lost fit comfortably within this definition.

Payments for lost wages are undoubtedly a form of money remuneration. Remuneration has long been understood as synonymous with compensation or repayment.[19] Further, Congress prefaced "money remuneration" with the broadening words "any form." 28 U.S.C. § 3231(e). "Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *United States v. Gonzalez*, 520 U.S. 1, 5 (1997). The court of appeals thus found that "damages for lost wages are a 'form of money remuneration paid to an individual' . . . ." (Pet.App. 19a.)

And money payments for time lost from work as an employee are for "services rendered as an employee ...." 26 U.S.C. § 3231(e). These payments arise from the employment relationship. (J.A. 89a, 92a-94a; SA1, 4.) The Eighth Circuit, however, advanced a different view. The court found that "the plain language of the RRTA refers to services that an employee actually renders, not to services that the employee would have rendered but could not." (Pet.App. 20a.)

In fact, the language is not so plain. Over a half a century ago, this Court construed a similar phrase—

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[19] *See, e.g.*, Black's Law Dictionary 1537 (3d ed. 1933) (defining "remuneration" as "reward, recompensate, salary"); Webster's Seventh New Collegiate Dictionary 1921 (1969) (defining "remunerate" as "to pay an equivalent to an equivalent to for a service, loss, or expense: recompense" (capitalization omitted); 8 The Oxford English Dictionary 439 (1st ed. 1933) (defining "[r]emuneration" as "[r]eward, recompense, repayment; payment, pay").

"any service . . . performed . . . by an employee for his employer"—to cover an award for lost wages. *See Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358 (1946). In *Nierotko*, the employee obtained a "back pay" award based on a wrongful discharge claim and then requested credit from the Social Security Board for the time lost on his social security account. *See id.* at 359–60 60. The Board refused because the employee had not performed any actual service during this period. *Id.* at 365.

In reversing, this Court recognized that the definition of "wages" in the Federal Insurance Contributions Act (FICA) had two parts. First, the term "wages" was defined to mean "all remuneration for employment . . . ." *Id.* at 365, quoting 42 U.S.C. § 402(a). Second, the term "employment" was defined as "any service, of whatever nature, performed . . . by an employee for his employer . . . ." *Id.* at 363–65, quoting 42 U.S.C. § 402(a). It was the second part of the definition—service performed—that was at issue. *Id.* at 366. This Court rejected the Social Security Board's interpretation, explaining:

> The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee.

Id. at 365–66 (emphasis supplied). The Court found the statutory language was so clear that it overruled the administrative interpretation. *See id.* at 369.

In 2014, this Court again read the "service performed" phrase broadly. *See United States v. Quality Stores*, 134 S. Ct. 1395 (2014). There, the issue was whether severance payments to terminated employees constituted remuneration for services performed under FICA. *Id.* at 1398. Reiterating that the service performed phrase is not limited to work actually done, the Court held that such payments were taxable wages under FICA. *Id.* at 1400, 1405. Thus, *Nierotko* and *Quality Stores* support a broad reading of the "service rendered" phrase in the RRTA to encompass an award for lost wages regardless of whether the employee actually worked during the time period.[20]

The Eighth Circuit offered an alternative interpretation of the "services performed" phrase. According to the court, the "plain language of the RRTA refers to services that an employee *actually* renders, not to services that the employee would

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[20] The Eighth Circuit distinguished *Nierotko* and *Quality Stores* because the FICA imposes taxes on "employment" instead of "services." (Pet.App. 20a.) But FICA defines "employment" to mean "any service . . . performed . . . ." 26 U.S.C. § 3121(b) ("the term 'employment' means any service, of whatever nature, performed . . . ."). The critical point here is not any difference in the use of the words "employment" and "services" but in the similarity of the *underlying* defining language—both terms turn on the concept of "service performed."

have rendered but could not." (Pet.App. 20a) (emphasis added). The most obvious problem with this construction is that "the word 'actually' does not appear there in the 'plain text' of that Code section." *See Norfolk S. Ry. Co. v. Williams*, No. 2160823, __ So. 3d __, 2018 WL 2995699, at *6 (Ala. App. June 15, 2018). This Court "ordinarily resist[s] reading words . . . into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009). This is particularly important here where Congress had previously defined compensation as "active service" but dropped this requirement from the statute in 1937.

The injection of this requirement back into the statute is problematic enough, but the Eighth Circuit would add words to the statute only to render other portions superfluous. The breadth of a statute is "reinforce[d]" by statutory exceptions that would be "superfluous" if the provision was given a narrower interpretation. *Am. Bank & Trust Co. v. Dallas Cnty.*, 463 U.S. 855, 863–864 (1983). The RRTA contains an exhaustive list of express exclusions from the definitional term "compensation." (Pet.App. 33a-40a.) The first exclusion is for payments made to an employee under a plan or system "established by the employer . . . on account of sickness or accident disability . . . ." 26 U.S.C. § 3231(e)(1)(i) (Pet.App 33a.) This exclusion has been in the RRTA since 1976—the year after Congress removed the time-lost language from Section 3231(a)(1). 26 U.S.C. § 3231(e)(1)(i) (1976); Pub. L. 94-547 (Oct. 18, 1976). In 1982, Congress added further exclusions for disability benefits received under the RRA and for sickness benefits under the Railroad

Unemployment Insurance Act when such sickness is the result of an on-the-job injury. 26 U.S.C. § 3231(e)(4)(A), (B) (1982); Pub. L. 97-123 (Jan. 1, 1982); Pet.App. 37a-38a. These exemptions would be unnecessary were time-lost payments not within the definition of compensation. Because the statute as redrafted by the Eighth Circuit renders these exemptions superfluous, it should be rejected. *See Quality Stores*, 134 S. Ct. at 1400 (declining to adopt a narrow reading of the "services performed" language in FICA's definition of wages when doing so would render an exemption superfluous).

Given the statutory text, it is unsurprising that virtually every court to consider the issue has concluded that pay for time lost comfortably fits within the statutory definition of compensation.[21] Thus, on the basis of the statutory language alone,

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[21] *See, e.g.*, *Norfolk S. Ry. Co. v. Williams*, 2018 WL 2995699, at *6–8; *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511 (6th Cir. 2009); *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 25–30 (Pa. Super. Ct. 2016); *Phillips v. Chicago Central & Pacific R.R.*, 853 N.W.2d 636, 650–51 (Iowa. 2014); *Cowden v. BNSF Ry. Co.*, No. 4:08-cv-01534, 2014 WL 3096867, at *2 (E.D. Mo. July 7, 2014); *Heckman v. Burlington N. Santa Fe Ry. Co.*, 837 N.W.2d 532, 539–42 (Neb. 2013); *Cheetham v. CSX Transp.*, No 06-cv-704, 2012 WL 1424168 (M.D. Fla. Feb. 13, 2012); *Vodden v. BNSF Ry. Co.*, No. 27 CV-11-18376, 2012 WL 7150849 (Minn. Dist. Ct. Dec. 19, 2012); *Nielsen v. BNSF Ry. Co.*, Case No. 0807-10580, 2012 WL 12526344 (Oregon Cir. Ct. Mar. 5, 2012). *But see Mickey v. BNSF Ry Co.*, 437 S.W.3d 207, 214–15 (Mo. 2014) (noting that the RRTA's broad definition of "compensation" does not specifically mention pay for time lost); *Munoz v. Norfolk S. Ry.*, 2018 IL App (1st) 171009 (Ill. App. 2018) (following the *Loos* decision at issue here).

this Court should hold that pay for time lost is included in the definition of taxable compensation under the RRTA.

B. The Statutory Context

That's not all. "The broader statutory context points to the same conclusion the immediate text suggests." *Wisconsin Cent.*, 138 S. Ct. at 2071.

The meaning of "compensation" in the RRTA is clarified by the illustrative examples of that term in the companion statute, the RRA.[22] Both statutes employ the same term "compensation" and provide the same definition of that word: "The term 'compensation' means any form of money remuneration paid to an individual for services rendered as an employee . . . ." 45 U.S.C. § 231(h)(1) (Pet.App. 41a); 26 U.S.C. § 3231(e)(1) (Pet.App. 33a).

The RRA's definition of "compensation" then continues: "*including* remuneration paid for time lost as an employee . . . ." 45 U.S.C. § 231(h)(1) (Pet.App. 41a) (emphasis added). The use of the word "including"—as opposed to "and"—makes clear that pay for time lost is illustrative of the type of payment covered. "[T]he term 'including' connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). It

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[22] *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (statutory terms are often "clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear").

does not impose a new, additional limitation. *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979) (rejecting the argument that "including" means "and" or "as well as").[23] Thus, here, the "including" phrase in the RRA introduces only an example of the type of payment for services rendered covered by the definition.

The RRA, in turn, makes clear that pay for time lost includes absence on account of a personal injury. "An employee shall be deemed to be paid 'for time lost' the amount he is paid by an employer with respect to identifiable period of absence from the active service of the employer, *including* absence on account of personal injury . . . ." 45 U.S.C. § 231(h)(2) (Pet.App. 42a) (emphasis added). Thus, the RRA demonstrates that the phrase "services rendered" is broad enough to encompass pay for time lost due to a personal injury.

This guidance is particularly valuable because the RRA and RRTA address the same subject matter. Congress enacted these two statutes "simultaneously" in 1937 to "implement a program by which pensions are provided out of funds derived from taxes upon carriers and their employees." *Shattuck v. Gallagher*, 218 F.3d 428, 429–30 (6th

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[23] According to dictionaries and English-usage treatises, "to include" means "to contain as a part or member, or among the parts and members, of a whole," and it suggests "the component items are not being mentioned in their entirety" and "the list is merely exemplary." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 132 (2012) (quotations and citations omitted).

Cir. 1955). "[S]tatutes addressing the same subject matter generally should be read 'as if they were one law.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). "The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context." *Id.*

Because the RRA and RRTA represent different sides of the same coin, the lower courts often look to the one when interpreting the other. *See Atl. Land & Improvement Co. v. United States*, 790 F.2d 853, 856 & n.5 (11th Cir. 1986). "The RRA and the RRTA are inextricably interconnected because the latter funds the former." *Phillips v. Chicago Cent. & Pacific R.R. Co.*, 853 N.W.2d 636, 649 (Iowa. 2014). "Indeed, without the benefits provided for in the RRA, there would be no need for the taxing provisions of the RRTA." *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 25–30 (Pa. Super. Ct. 2016). Their similarly worded provisions "should be identically construed and applied." *Universal Carloading & Distrib. Co. v. Pedrick*, 184 F.2d 64, 66

(2d Cir. 1950).[24] The two federal agencies charged with administering these statutes agree.[25]

This holistic approach is especially appropriate in interpreting the meaning of "compensation." Classification of a payment as "compensation" triggers benefits for the employee under the RRA. Even with short periods of lost time, an employee increases his eligibility for retirement benefits by treating the payments as compensation under the RRA. The amount of his benefit increases with each additional month of creditable service. 45 U.S.C. § 231b(b). Respondent Loos received four months of additional credit toward his service time for the time lost as a result of his personal injury. (Supp. App. 3.) Giving the same meaning to "compensation" under the RRTA and the RRA assures that the time-lost dollars that enhance benefits will be taxed at the same rate as other dollars increasing benefits. Thus, treating the RRA definition as a further elaboration of the RRTA definition will ensure adequate funding for the retirement benefits the employees will receive. "Because an employee's RRA benefits

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[24] *See also Livingston Rebuild Center v. R.R. Retirement Board*, 970 F.2d 295, 299 (7th Cir. 1992) (differing interpretations of the definition of employer under the RRA and RRTA produce "a muddle"); *Carland Inc. v. United States*, No. 93-0277-CV-W-2, 1995 WL 218576, at *4 n.3 (W.D. Mo. Feb. 14, 1995); *Missouri Pac. Truck Lines, Inc. v. United States*, 3 Cl. Ct. 14 (1983), *aff'd*, 736 F.2d 706 (Fed. Cir. 1984).

[25] *See* IRS Rev. Rul. 74-121 (IRS RRU), 1974-1 C.B. 300, 1974 WL 34878; U.S. Railroad Retirement Board Legal Opinion L-2005-25 at 2 (Dec. 2, 2005).

increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under the RRTA to pay for those benefits." *Liberatore*, 140 A.3d at 29.

The court of appeals emphasized that Congress included "pay for time lost" in the RRA yet omitted it from the RRTA. "[T]his suggests that Congress did not intend the RRTA to include pay for time lost." (Pet.App. 21a). But Congress prefaced the "pay for time lost" language in the RRA with the word "including": "The term 'compensation' means any form of money remuneration paid to an individual for services rendered . . . *including* remuneration paid for time lost as an employee . . . ." 45 U.S.C. § 231(h)(1) (Pet.App. 41a) (emphasis added). Because both statutes use the same definition—"any form of money remuneration paid to an employee for services rendered"—the RRA's illustration of the type of payment covered by this definition is relevant to interpreting the RRTA.

Thus, the statutory context gives clarity to the RRTA's definition of compensation. It shows that Congress viewed pay for time lost "as a subset of remuneration earned by an individual for services rendered as an employee." *Norfolk S. Ry. v. Williams*, 2018 WL 2995699, at *6.

C. The Statutory History

The history of the RRTA also demonstrates Congress's intent that payments for time lost be considered "compensation." *Wisconsin Cent.*, 138 S. Ct. at 2071–72.

First, the definition of compensation was initially limited to remuneration "received" for "active service." Act of Aug. 20, 1935, Pub. L. No. 400, § 1, 49 Stat. 974 (Aug. 29, 1935). In 1937, Congress dropped the word "active" from the definition. *See* Carriers Taxing Act of 1937, Pub. L. No. 174, § 1 (June 20, 1937). This reflected that Congress did not believe active service was a requirement to the definition of compensation.

Second, when Congress added in the "services rendered" phrase into the definition, Congress also added the illustrative example of pay for time lost. Thus, for the next several decades, the first paragraph of the RRTA's definition of compensation contained the broad definitional language–"any form of money remuneration earned . . . for services rendered"–followed by the phrase "including remuneration paid for time lost . . . ." 26 U.S.C. § 3231(e). And from 1975 to 1983, the RRTA's definition of compensation continued to refer to payments for time lost in the second paragraph of the defined term compensation. Thus, for more than four decades, the definition of compensation in the RRTA included pay for time lost as a subset of payments covered by the "services rendered" definition. *Norfolk S. Ry. v. Williams*, 2018 WL 2995699, at *7. This history confirms that the "services rendered" language is broad enough to include pay for time lost.

Third, while Congress removed the last references to time-lost in 1985, it did not change the key statutory definition of the term compensation. Those definitions remained the same in both the

RRTA and RRA. As courts have explained, it is reasonable to infer that Congress does not intend a substantive change when it deletes an example but retains the same substantive definition.[26] If Congress intended to exclude all time-lost payments after 1983, it would have added those payments as exclusions from the definition. The RRTA itemizes an exhaustive list of exclusions from the term compensation, but time-lost payments for personal injury are not among them. 26 U.S.C. § 3231(e) (Pet.App. 33a-40a).

Fourth, the legislative history confirms that, even after the time-lost references were removed, Congress intended consistency in the benefits and taxing procedures. The time-lost language was introduced in 1937 primarily to dictate *when* a time lost payment was earned. When the statutory test was changed from "earned" to "paid," this language was no longer needed.[27]

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[26] *See, e.g., Architectronics, Inc. v. Control Sys.*, 935 F. Supp. 425, 441 (S.D.N.Y. 1996) ("That a clause has been deleted from a draft of a statute, without more, does not mean that the polar opposite of the clause was enacted, particularly when the clause in question did no more than provide a list of examples that did not purport to be exhaustive."); *A. Brod, Inc. v. SK & I Co.*, 998 F. Supp. 314, 322 (S.D.N.Y. 1998) ("all indications are that Congress, despite deleting the examples of non-equivalence, viewed those examples—including breaches of trust—as illustrative of non-equivalent, non-preempted state law rights").

[27] This statutory history is explained in depth in a 1993 IRS Technical Advice Memorandum, which is attached as an addendum to this brief. (Addendum 1a-20a). This TAM is also available in its entirety at 1993 WL 187036.

Specifically, in 1937, Congress moved the timing of taxation from when remuneration is "received" to when remuneration is "earned." S. Rep. No. 818, 75th Cong., 1st Sess. 4 (1937), *reprinted in* 1939–2 C.B. 629, 632. Under this standard, pay for time lost presented its own unique difficulties because the employee is paid at a different time than when the remuneration would have been earned. This required the IRS to have special rules assigning a time of assessment to pay for time lost. (Addendum at 7a.) Hence, the statutory language directing the treatment of pay for time loss was added. (*Id.*) The phrase "including remuneration paid for time lost" served as an introduction to this topic and the remaining phrase stated the rule. Those rules were necessary when the statute focused on the time in which the remuneration was "earned" but were less necessary, if at all, when the statute was triggered when the remuneration was paid. (Addendum at 7a, 13a).

In 1975, Congress again changed the standard – this time from "earned" to "paid." It then began to jettison the language dealing with the timing of pay for time lost. Since Congress was removing the special timing rule from the RRTA definition, the introductory phrase "including remuneration paid for time lost" was no longer needed. (Addendum at 7a-8a, 13a).

Senator Long, Chairman of the Senate Finance Committee, explained the reasons for the 1975 amendment: "The amendment deals with the method of assessing railroad retirement payroll taxes." 121 Cong. Rec. 26759 (Aug. 1, 1975). As the

Senator explained, due to an intervening revenue ruling, the taxing basis was inconsistent with the basis under which the Railroad Retirement Board credits compensation for benefit purposes. *Id.* Thus, the amendment "will make the two procedures consistent in that for both tax assessment and benefits computation purposes wages will be considered to be earned as of the period when they are actually paid ...." *Id.* *See* 121 Cong. Rec. 24479 (July 24, 1975).

Congressman Corman, who introduced the bill in the House, similarly explained that the bill was designed to make the procedures identical for computing benefits and taxes. *See* 121 Cong. Rec. 27014 (Aug. 1, 1975). In this context, it is inconceivable that Congress intended to reject taxes altogether for time-lost pay while including such payments in calculating the benefits.

This is confirmed by an exchange between Representatives Conable and Stieger (another sponsor of the bill) on the House floor that same day:

> Mr. CONABLE. .... Is it not true that this also does not act as a precedent in other areas, it relates only to Railroad Retirement and **will not cause serious problems beyond the $10,000 revenue loss, which is estimated to be the total impact on the Treasury?**
>
> Mr. STIEGER. It is not a precedent. It is only an administrative change.

121 Cong. Rec. 27014 (Aug. 1, 1975) (emphasis added). Congressman Stieger reiterated: "The change is one in which it will be easier for the railroads to keep their books *** **The estimated revenue loss is something in the range of $10,000.**" *Id.* (emphasis added).

The reference to a $10,000 revenue loss is a telltale sign of the type of change Congress thought it was making—a minimal adjustment in the timing of the taxed compensation, not an exclusion of all awards for time lost. It is inconceivable that Congress could immunize all pay for time lost from RRTA taxes and expect only a $10,000 revenue loss. In 2016 alone, the railroads paid out at least $1.9 billion in such benefits, which were subject to railroad retirement taxes.[28] In addition, with over 4000 railroad employee on-the-job incidents each year, the total FELA payments each year is in the hundreds of millions of dollars. This case ***alone*** concerns payroll taxes of $9990 on lost pay.

In 1983, Congress deleted subsection 2 in a technical amendment, but this technical amendment had a different purpose. It was enacted to shift the definition of compensation from a monthly wage base to an annualized wage base. H. Rep. No. 98-30, 98th Cong., 1st Sess. p. 21 (1983). Thus, in 1983, Congress removed subsection (2) in its entirety, including the portions addressing the timing of payments other than pay for time lost. *Id.* The

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[28] Amicus Brief of the Association of American Railroads in Support of Certiorari, at 3 (filed Feb. 26, 2018).

Committee Report explained that "compensation would be taxed when it is paid to the employee," *i.e.*, employees could no longer elect to deem payment in the period in which the compensation was earned. *Id.* at 29. The 1983 Act's legislative history does not provide even the remotest indication that the amendment intended to exclude time-lost payments.

Contemporaneous views confirm this reading of the statutory history. In the wake of the 1983 amendments, courts examined the history and concluded that Congress did not intend to exclude pay for time lost from the RRTA's definition. "Nothing in the legislative history indicates that Congress intended to change the substantive definition of 'compensation.'" *Chi. Milwaukee Corp. v. United States*, 35 Fed. Cl. 447, 455 & n.6 (1996). "When considering the statutory language and pertinent legislative history . . . , it is apparent that the intent of the [1975] amendment" was to change the *timing* rules for when the taxes were assessed. *Atchison, Topeka & Santa Fe Ry. v. United States*, 628 F. Supp. 1431, 1437 (D. Kan. 1986). "[T]he legislative history of these amendments ... reveals that the 1975 amendment was intended solely to clarify that the RRTA tax was assessed to the extent and at the rate applicable when paid, rather than when earned, as has been the case prior to 1975...." *Milwaukee Corp. v. U.S.*, 35 Fed. Cl. at 455 & n.6. Its purpose was to change the timing rules for ***when*** (not whether) to assess payroll taxes. *See id.; see also Phillips*, 853 N.W.2d at 641 n.2, 646-47, 649-50.

The history shows that Congress deleted the rules bearing on the timing of pay for time lost, but did not

intend to exclude this form of money remuneration from compensation taxable under the RRTA.

D. The Longstanding IRS Regulations Are Consistent With The Statutory Text, Context, and History

Given the text, context, and history, the RRTA is unambiguous in including pay for time lost within taxable compensation. Even assuming the language were ambiguous, the longstanding administrative interpretation confirms congressional intent to include pay for time lost.

Here, there are two agencies with responsibility for administering the railroad retirement system and both interpret the term "compensation" in the RRTA as encompassing FELA awards for time lost.

The IRS has promulgated a regulation defining "compensation" to include "pay for time lost." 26 C.F.R. § 31.3231(e)-1(a)(4) (Pet.App. 18). The regulation further provides that the term compensation "is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer." 26 C.F.R. § 31.3231(e)-1(a)(3) (Pet.App. 18). The IRS is charged with promulgating rules and regulations for the enforcement of Title 26. 26 U.S.C. § 7805; *Correll*, 389 U.S. at 306-07.

This IRS interpretation is longstanding. Immediately after the passage of the taxing act in 1937, when Congress dropped the requirement of "active" service found in the preceding statute, the IRS promulgated a regulation that provided: "The

term [compensation] is not confined to amounts earned or paid for active service but includes amounts earned or paid for periods during which the employee . . . is absent from active service." 26 C.F.R. § 410.5 (1938). A version of this regulation has remained in effect, without interruption, for the past eighty years. *See* 26 C.F.R. § 410.5 (1947) ("The term 'compensation' is not confined to amounts earned or paid for active service, but includes amounts earned or paid for an identifiable period during which the employee is absent from the active service of the employer."); 26 C.F.R. §31.3231(e) – 1 (b) (2) (1956) (same). The agency's longstanding interpretation is consistent with the statutory history, in which Congress eliminated the reference to "active service" in the 1937 amendment and thus embraced a definition of compensation that included pay for time lost.

In 1994, the IRS specifically confirmed that the term "compensation" continued to include pay for time lost. It proposed a regulation "providing that compensation includes payments for time lost." 59 Fed. Reg. 66188 (Dec. 23, 1994). A commenter suggested deleting this language in light of the 1983 statutory changes. The IRS rejected this suggestion, explaining that the 1983 amendment changed "[t]he inclusion of items to a 'paid basis' from an 'earned basis' . . . ." *Id.* . . "The legislative history does not indicate that Congress intended to exclude payments for time lost from compensation." *Id.* Thus, the IRS promulgated a regulation that specifically identifies pay for time lost as covered by "compensation." 26 C.F.R. § 31.3231(e)-1(a)(4). That regulation remains in effect today, some 24 years later. Congress

amended the RRTA's definition of compensation in 1996, 2000, 2001, 2003, and 2004 but did not overrule the agency interpretation.

The IRS's interpretation is reasonable. It aligns compensation for tax purposes with compensation for benefits purposes. The court of appeals expressly acknowledged that the idea "that the RRTA should tax what the RRA uses to calculate benefits makes sense as a statutory scheme." Pet.App. 23a. As a permissible interpretation of the statute, it is easily entitled to deference. *See Mayo Found. v. United States*, 562 U.S. 44, 52–53 (2011); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("If the agency's answer is based on a permissible construction of the statute, that is the end of the matter.").

In any event, the agency is entitled to a strong measure of deference under traditional standards. "[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charted with its administration." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). "This is especially so where Congress has re-enacted the statute without pertinent change." *Id.* For 80 years, through multiple revisions of the statute, the IRS has maintained that compensation does not require active service but will also encompass "amounts earned or paid for an identifiable period during which the employee is absent from the active service of the employer." 26 C.F.R. § 410.5 (1938). This interpretation was made contemporaneously with the enactment of the statute, *see Norwegian Nitrogen Products Co. v. United States*, 288 U.S.

294, 315 (1933), preserved through various congressional amendments, and continuously made public through a binding regulation. In these circumstances, it is entitled to great weight. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) ("Of particular relevance is the agency's contemporaneous construction which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute.'") (citation omitted).

Further, the Railroad Retirement Board has taken the same position, and publicized it throughout the rail industry. For example, in a 2008 publication, *Railroad Retirement Service Credits and Pay for Time Lost*, the Board addressed the question: "Is pay for time lost subject to railroad retirement tier I and tier II payroll taxes?" (J.A. 68a.) The Board answered: "Yes. As with all compensation, pay for time lost is subject to taxation under the Railroad Retirement Tax Act . . . ." (J.A. 68a.) *Accord Pay for Time Lost From Regular Railroad Employment* (2015) ("Pay for time lost is considered compensation under the Railroad Retirement Tax Act. Thus, an employer is required to withhold and pay the employment taxes due on pay for time lost.") (J.A. 70a, 75a). The principle that pay for time lost is taxable just as it is creditable is not secret law, but a longstanding tenet of the railroad retirement system.

II. There Is No Exemption In The RRTA For Lost Wages Due To A Personal Injury

Respondent Loos has argued that his damage award is exempt from Railroad Retirement taxes under 26 U.S.C. § 104 ("Section 104"). The Supreme

Court of Missouri agreed with this interpretation. *See Mickey v. BNSF Ry Co.*, 437 S.W.3d 207, 214–15 (Mo. 2014). This argument fails for the same reason – it is inconsistent with the statutory language, context and history of the RRTA.

A. Congress Did Not Identify Section 104 As An Exclusion From The RRTA

The most authoritative guide to congressional intent is the text of the statute. *See Wisconsin Central*, 138 S. Ct. at 2070. Here, nothing in Section 104 asserts an exemption from the RRTA. And nothing in the RRTA asserts that Section 104 will provide an exemption. There is no language supporting Respondent's theory. *Norfolk S. Ry. Co. v. Williams*, 2018 WL 2995699, at *10 ("We have not been directed to any provision of Title 26 that indicates that the personal-injury exclusion applies to RRTA taxes.").

On its face, Section 104 does not provide an exclusion from the RRTA. Section 104 provides an exclusion from a different term (gross income) for purposes of a different statute (income tax). Section 104 is found in Part III of Subchapter B of the Internal Revenue Code, entitled "Items specifically excluded from gross income." Section 104 states that "gross income does not include . . . the amount of any damages received . . . on account of personal physical injuries or physical sickness . . . ." 26 U.S.C. § 104(a)(2). It is one of approximately 40 provisions identifying exclusions from "gross income." Gross income is a defined term (26 U.S.C. § 61) used in the definition of "taxable income." 26 U.S.C. § 63(a).

Rather than relying upon "gross income," the RRTA and RRA use the term "compensation," with its own elaborate definition. 26 U.S.C. §§ 3201, 3232(a), 3231(e). "The use of different terms within related statutes generally implies that different meanings were intended." *United States v. Bean*, 537 U.S. 71, 76 n.4 (2002) (citation and quotation omitted).

For its part, the RRTA does not incorporate the Section 104 exclusion in its definition of "compensation." Congress had ample opportunity to incorporate that term, but chose not to do so. When Congress enacted the RRTA in 1937, the exclusion for personal injury damages had been on the books since 1918. *See* Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066. That Act stated: "for purposes of this title . . . the term 'gross income' . . . [d]oes not include . . .the amount of any damages received whether by suit or agreement on account of such injuries or sickness." *Id.*

When Congress passed the RRTA in 1937, it chose not to incorporate this exclusion. In fact, Congress affirmatively stated that taxable "compensation" for purposes of that Act meant "money remuneration earned by an individual for services rendered . . . *including remuneration paid for time lost as an employee.*" 26 U.S.C. § 1532(e) (Supp. V 1939). In 1946, Congress made this point even more clear when it amended the RRTA to provide:

> An employee shall be deemed to be paid, "for time lost" the amount he is paid by an

> employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury. . . . If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost.

60 Stat. 725. In light of this language, it is impossible to conclude that Congress saw Section 104 as creating an exclusion for damages based on personal injury.

The lack of any congressional direction to exclude personal injury awards from the RRTA is particularly striking because Congress did choose to incorporate a number of exclusions from "gross income" into the definition of "compensation" under the RRTA. These include the following:

RRTA Section	Subject	Income Tax Exclusion	Date Added
§ 3231(e)(5)	Employee achievement awards	§74(c)	1984
§ 3231(e)(5)	Amounts received under Federal or State student loan forgiveness	§108(f)(4)	1984
§ 3231(e)(5)	Qualified scholarships	§117	1984
§ 3231(e)(5)	Fringe benefits	§132	1984
§ 3231(e)(6)	Employer-provided educational assistance	§127	1984
§ 3231(e)(9)	Value of meals and lodging furnished by employer	§119	1989
§3231(e)(10)	Medical savings account contributions	§106(b)	1996
§3231(e)(11)	Employer contributions to health savings accounts	§106(d)	2003
§3231(e)(f)	Qualified stock options	§422(b) and §423(b)	2004

Significantly, when Congress intended to incorporate an exclusion from the definition of "gross income," it did so *expressly*. As the table indicates, references in the RRTA to the exclusions from gross income were added in 1984, 1989, 2003 and 2004. However, at no time did Congress designate Section

104 as an exclusion that would apply to the RRTA's definition of compensation. "The fact that ... Congress provided specific exemptions ... is evidence that Congress did not intend to recognize further exemptions ...." *United States v. Bess*, 357 U.S. 51, 57 (1958). *See also Elgin v. Dep't of Treasury*, 567 U.S. 1, 13 (2012) (when "Congress decline[s] to include an exception," that "indicates that Congress intended no such exception").

Here, Congress not only provided specific exemptions to the definition of "compensation," but chose the exemptions from the income tax that would be applicable under the RRTA, and specifically identified them as such. Despite multiple amendments adding exclusions to the definition of "compensation," Congress did not select Section 104(a) for that role.

Moreover, the language of the RRTA specifically *included* payments on account of personal injury for substantial periods of time. This contradicts any notion that Section 104 could extend to the RRTA. As one court noted:

> As noted above, the 1970 version of 26 U.S.C. § 3231(e)(1) specifically provided that compensation taxable under the RRTA included pay for time lost, and the 1970 version of 26 U.S.C. 3231(e)(2) specifically provided that pay for time lost included pay for absence on account of personal injury. If Congress intended the personal-injury exclusion to apply to RRTA taxes, it would not have specifically provided in the 1970 version of the RRTA that compensation

> taxable under the RRTA included pay for absence on account of personal injury.

Norfolk So. Ry. v. Williams, 2018 WL 2995699, at *4. The use of broad language in the definition of compensation confirms that Congress did not intend an exclusion for personal injury under Section 104. The RRTA is not ambiguous.

Even if there were an ambiguity, the IRS's interpretation would be entitled to deference. For more than 50 years, the IRS has expressed the view that a railroad employee could be liable for taxes on a personal injury judgment under the RRTA, even though he would not be liable for federal income taxes by virtue of Section 104.

Consistent with the statutory language from 1937 to 1983, Treasury's regulations provided that compensation includes an identifiable period of absence from the active service of the employer "on account of personal injury." 26 C.F.R. § 410.5 (1947); *see also* 26 C.F.R. §31.3231(e)-1(b)(3) (1963).

In addition, the IRS directly addressed the relationship between Section 104 and the RRTA in its revenue rulings.[29] In 1961, a railroad employee sought advice on the federal income tax consequences of the settlement of his FELA claim.

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[29] "A revenue ruling is an official interpretation by the Service of the Internal Revenue Code, related statutes, tax treaties, and regulations. It is the conclusion of the Service on how the law is applied to a specific set of facts." IRS Manual at 32.2.2.3.1 – "Revenue Ruling Defined."

See Rev. Rul. 61-1, 1961-1 C.V. 14, 1996 WL 12630 (Jan. 1961). After settling the FELA claim with his railroad employer, the employee "elected, by separate agreement, to apportion part of the amount to 'time lost' in order to receive railroad retirement credit for the time he was incapacitated." *Id.* The IRS distinguished federal income tax liability from the employee's obligation to pay taxes for the same amounts under the RRTA. "The fact that in this case 'time lost payments' constitute compensation for the purposes of taxes imposed by the Railroad Retirement Tax Act is not controlling for Federal income tax purposes." *Id.* Thus, the IRS found that the employee was not required to pay income taxes on the settlement amounts of his FELA claim pursuant to Section 104(a)(2) even though that same amount was taxable as pay for time lost under the RRTA. *Id.*

The IRS reaffirmed this ruling in IRS Rev. Rul. 85-97, 1985-2 C.B. 5, 1985 WL 287177 (July 1985) (explaining that Revenue Ruling 61-1 "states that the fact that the 'time lost payments' constituted compensation for purposes of the taxes imposed by the Railroad Retirement Tax Act does not preclude the application of the exclusion from gross income under section 104(a)(2)"). These revenue rulings remain in force today.

The Railroad Retirement Board has also offered guidance. A pamphlet on its website, "Pay for Time Lost From Regular Railroad Employment," explains that "[t]he most common type of pay for time lost arises out of 'on the job' personal injury settlements." *Id.* at 3 (J.A. 71a). "Pay for time lost is considered

compensation under the Railroad Retirement Tax Act. Thus an employer is required to withhold and pay the employment taxes due on pay for time lost." *Id* at 6 (J.A. 75a).

Thus, for almost six decades, the IRS has recognized that a railroad employee can be liable for RRTA taxes on personal injury damages that would be excluded from gross income for purposes of the federal income tax. That longstanding view is entitled to deference. *Davis v. United States*, 495 U.S. 472, 484 (1990).

B. The Analogy To FICA Taxes Does Not Apply

Respondent has argued that because personal injury awards are not taxable as "gross income," they are not "wages" subject to FICA taxes and because they are not "wages" under FICA, they are not "compensation" under the RRTA. (Cert. Opp. 13–14.) Respondent creates this rope bridge with a series of district court decisions, which reason that "because wages are a subset of income, income exclusions like §104(a)(2) must apply to wages, too." *Cowden v. BNSF Ry Co.*, 2014 WL 3096867 at *10 (E.D. Mo. 2014). Then they reason that wages are equivalent to compensation.

This argument has an obvious flaw: it conflates three different terms from three different statutes and claims that an exclusion from one must create an exclusion from another. This Court will "usually 'presume differences in language like this convey differences in meaning.'" *Wisconsin Cent.*, 138 S. Ct. 2071 (citation and quotation omitted).

Even if "income" is, in a general sense, a broader concept than "compensation," it does not mean that "compensation" necessarily has the same exclusions. The statute itself proves this point. As discussed above, the RRTA has a series of express statutory provisions that incorporate specific exclusions from the definition of "gross income." Congress incorporated these exclusions with care and modified the standard in certain circumstances. *See, e.g.*, 26 U.S.C. § 3231(e)(5) (making FICA exclusion applicable when "reasonable to believe"). If the term "compensation" necessarily incorporated every exclusion from gross income, then none of these incorporation provisions would have been necessary. The premise of congressional action is that the exclusions from gross income were not exclusions from compensation unless identified as such.

Respondent's cases rely on a Treasury regulation which, they say, makes "compensation" under the RRTA equivalent to "wages" under FICA. However the full regulation falls far short:

> The term compensation has the same meaning as the term wages in section 3121(a) . . . except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

26 C.F.R. § 31.3231(e)-1(a)(1) (Pet.App. 46a).

The regulation draws a parallel, but recognizes exceptions. The first exception relates to situations

specifically limited by the RRTA. The RRTA has never by its terms included an exclusion for personal injury actions, but has broadly defined compensation to include "any form of money remuneration paid to an individual for services rendered as an employee . . .." Since Congress itself has found that a payment for time lost on account of a personal injury meets this definition, the RRTA is limiting here. "So in the end all the regulation winds up saying is that we should look carefully at the relevant statutory texts." *Wisconsin Cent.*, 138 S. Ct. at 2074. The second exception applies where a regulation requires a distinction. The regulation also recognizes that the IRS can provide guidance. In this case, the IRS has provided such guidance, both in the form of a regulation that includes pay for time lost in "compensation" for purposes of the RRTA and in Revenue Rulings that specifically address the section 104 exclusion and find it inapplicable to the RRTA. Thus, as this Court recognized in *Wisconsin Central*, this regulation does not alter the outcome.

Respondent argued that the outcome under the RRTA should be the same as the outcome under FICA. Even assuming Section 104 applies to FICA, Social Security is different from the Railroad Retirement system in a critical way. Unlike the Railroad Retirement Act, the Social Security Act "does not explicitly include an employee's pay for lost time due to personal injury when calculating benefits." *Liberatore*, 140 A.3d at 30 (citing 42 U.S.C. §§ 409, 415). "Therefore it follows that for purposes of collecting SSA taxes, FICA does not tax an award for time lost due to personal injury." *Id.* In contrast, under the RRTA, pay for time lost due to

personal injury is included in *both* the computation of benefits and the calculation of taxes.

CONCLUSION

The Court should reverse the portion of the judgment that refuses an offset of the RRTA taxes.

Respectfully submitted,

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July 2018

ADDENDUM

ADDENDUM

NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

Issue: June 4, 1993
January 29, 1993

IRS LETTER RULINGS AND TAMS (1954-1997), UIL NO. 3231.04-00 DEFINITIONS, COMPENSATION V. NOT COMPENSATION, LETTER RULING 9322001, (JAN. 29, 1993), INTERNAL REVENUE SERVICE, (JAN. 29, 1993)

ISSUES

1. Whether the separation payments constitute supplemental unemployment benefit payments under Rev. Rul. 77-347, 1977-2 C.B. 362, and are excluded from the definition of "compensation" under section 3231(e)(1) of the Internal Revenue Code?

2. Whether Public Law 94-93 excluded "pay for time lost" from the definition of "compensation" under section 3231(e) of the Code?

FACTS

Prior to the tax years in dispute, the Company operated within the railroad industry as a X business. The Act generally replaced the antitrust exemption enjoyed

by the Company in favor of an approach that largely operated pursuant to fair competition and market forces. Realizing that the Act's implementation would cause many workers to lose their jobs through consolidations, complete closings, or reduced operations, the Act required X businesses to provide employees affected by the Act to make "fair arrangements ... protective of interests of such employees."

The Act continues a long history in the rail industry of private and governmental programs or agreements to extend economic benefits to workers who lose their jobs, or suffer a decrease in compensation, as a result of mergers and other rail consolidations. The Interstate Commerce Commission ("ICC") has periodically utilized individual mergers as vehicles for addressing minimum protective conditions required throughout the rail industry. One such case was presented by New York Railway's application to acquire the Brooklyn Eastern District terminal. The employee protective conditions imposed on those parties as a precondition to the merger were later determined by the ICC to be of general applicability as industry-wide minimums (the "New York Dock Conditions").

In 1987, as a result of compliance with the Act, the Company and the Company's predecessor organizations ("Company R and Company S") ceased operations as X businesses. The Company selected a form of protection based on its perception of the New York Dock Conditions standard ("Act Payment"). The Company informed employees adversely affected by the Act of their eligibility for protective benefits under the New York Dock

Addendum

Conditions. Under the Company's separation program a separated employee was paid a monthly allowance equal to the employee's compensation in the last full month of employment prior to separation. Eligible employees with at least six years of service were afforded protection for six years. The protective period for employees with less than six years of service was the length of the employee's past service.

In the tax years at issue, most affected employees received their protective payments on a monthly basis, thus reducing their remaining protective periods. Affected employees who received payments remained in an employment relationship and were subject to recall. Some employees were recalled for one or two days per week on a rotating basis. Employees were permitted but not required to secure employment but any remuneration received offset dollar for dollar the amount of the Act Payment.

Certain terminated employees were ineligible for Act Payments but were provided with lump-sum termination payments ("Payment D"). An employee in this group could elect a lump-sum payment in an amount up to the maximum of one year's salary depending upon the employee's length of service. These terminated employees were not subject to recall.

Several of Company S's terminated employees were ineligible for any benefit entitlements under the Act, New York Dock Conditions or other protective agreements. In lieu of these benefits, they were contractually accorded

employee protection in the form of either a lump-sum separation allowance equal to one year's salary, or periodic payments (depending on the applicable pay period) for an agreed-upon length of time, less any compensation or benefits that the employee might receive from outside sources ("Payments E").

The Company paid the employer's share and withheld and remitted the employee's share of RRTA taxes on all the separation payments. The Company has filed refund claims for the employer and the employee portion of the previously paid RRTA taxes. The Company contends that the payments to employees and former employees in the tax years at issue were not "compensation" within the meaning of section 3231(e) of the Code. The Company contends that the payments are excluded from compensation on two alternative grounds: (1) the payments fall within the administrative exclusion described in Rev. Rul. 77-347, 1977-2 C.B. 362, for supplemental unemployment compensation benefits ("SUB-pay") and (2) the payments qualify as payments for "time lost" under Rev. Rul 65-251, 1965-1 C.B. 395, and were removed from the definition of compensation by Congress in 1975.

LAW AND RATIONALE

The Railroad Retirement Tax Act ("RRTA") was instrumental in the establishment of a separate system of retirement, disability, and unemployment benefits for the railroad industry. Sections 3201 and 3221 of the Code impose RRTA tax on the employer and the employee with respect to "compensation" paid by the employer to the

employee. Section 3231(e)(1) defines "compensation," with certain enumerated exceptions, as any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.

Section 31.3231(e)-1(a)(1) of the Employment Tax Regulations provides in pertinent part:

The term "compensation" means all remuneration in money ... which is earned by an individual for services rendered as an employee to one or more employers or as an employee representative. A payment made by an employer to an individual through the employer's payroll shall be presumed, in absence of evidence to the contrary, to be compensation for services rendered by such individual as an employee of the employer....

Section 31.3231(e)-1(a)(2) of the regulations states that compensation "is not confined to amounts earned or paid for active service, but includes amounts earned or paid for an identifiable period during which the employee is absent from the active service of the employer."

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Issue No. 2

The Company's second argument is that the separation payments are not "compensation" within the meaning of section 3231(e) of the Code. Instead, the Company claims that the payments are "pay for the time lost as an employee." The Company readily admits that these

time-lost payments were compensation subject to RRTA tax prior to Pub. L. 94-93's amendment to section 3231(e). However, the Company argues that Pub. L. 94-93 effectively excluded time-lost payments from the definition of compensation. Whether time-lost payments are excluded from compensation under section 3231(e) is not a question for which an affirmative answer can be readily ascertained absent a thorough analysis of section 3231(e) and its legislative history. As explained below, such an analysis demonstrates that Pub. L. 94-93 did not act to exclude time-lost payments from the definition of "compensation."

The Company has correctly noted that Title II of Pub. L. 94-93 amended the definition of "compensation" by deleting the phrase "remuneration paid for time lost as an employee." The Company's simplistic interpretation of the amendment overlooks the amendment's true effect as is aptly demonstrated by a thorough examination of the specific statutory changes. Exhibit A to this memorandum illustrates the changes made to section 3231(e) by Pub. L. 94-93. The statute deleted the bracketed language and added the underlined language.

An understanding of section 3231(e) of the Code as it existed prior to Pub. L. 94-93 is imperative to the statutory analysis. Prior to amendment, section 3231(e) (1) generally provided that "compensation" meant "any form of money remuneration *earned by* an individual for services rendered as an employee." In other words, taxes were assessed as of the period when the wages were actually earned rather than paid. This earned concept

was added by the 1937 Act to make "it clear that what is significant is that compensation has been earned by the employee, not that it has been actually received by him."[1] The earned concept posed special considerations for time-lost payments since they are payments attributable to a prior period during which no services were actually performed. Consequently, special rules were also necessary to allocate time-lost payments to the period in which the services would have otherwise been earned.

The 1937 Act adopted the necessary timing rules by incorporating the following highlighted language into the general definition:

The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, *including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.* (emphasis added).

The highlighted language discussed both the timing and the inclusion of time-lost payments. The timing rule (the phrase beginning with the word "but") was substantive since it specifically set forth the method for determining when time-lost payments were deemed earned, *i.e.*, the period in which the time was actually lost. By contrast, the inclusion provision (the phrase beginning with the word

1. S. Rep. No. 818, 75th Cong., 1st Sess., 1939-2 C.B. 632 (1937).

"including") was not substantive, but merely served as an introductory clause to establish the proper context in which the timing rule was to be interpreted. The phrase "*including* remuneration paid for time lost" would not have been needed but for the special timing rule. The fact that this phrase followed the much broader phrase "any form of money remuneration" indicates that time-lost payments were already included as a subset of the much broader compensation definition.

The 1937 Act adopted the definition of compensation in substantially the same form as it existed prior to being amended by Pub. L. 94-93. However, the 1937 Act was amended in 1946 by Pub. L. 79-592 ("1946 Amendment"). The statute had initially included a section 4(f) which was very similar to the provisions in Pub. L. 94-93. As described by the Senate Report, section 4(f) was "necessary to change the computation of benefits and taxes from a 'compensation earned' basis to a 'compensation paid' basis."[2] As support for the change, the Senate Report stated the following:

Under present law, compensation is credited to the month in which it was earned even though *in the case of pay for time lost*, adjustment board awards, retroactive wage increases, etc., *the amount earned is not ascertained until some time later when the reports for the period in which compensation was earned have already been made. This brings about heavy administration burdens* both

2. Suppl. S. Rep. 1710, Part II, 79th Cong., 2d Sess., p. 7 (1946).

on the Board and on the employers to make thousands of corrections in reports previously filed. These are useless operations since in most cases it makes little or no difference to the employee's annuity whether the compensation is credited at the time it is paid or at the time it is earned.[3] (emphasis added).

The Senate Report is significant since it illustrates the administrative difficulties associated with crediting time-lost payments to the proper period. It also indicates that the 1946 Amendment would not have excluded these payments from the definition of compensation, but would have only required that they be credited when paid. Although the 1946 Amendment was enacted, section 4(f) was not enacted; therefore, the computation of taxes remained on a "compensation earned" basis.

A second significant piece of background material was the publication of Rev. Rul. 75-266, 1975-2 C.B. 408, just one month prior to Pub. L. 94-93's enactment. Rev. Rul. 75-266 generally provided that lump-sum back pay was subject to RRTA taxes to the extent and at the rate of tax applicable when it was earned.

The portion of Pub. L. 94-93 which amended the definition of compensation was enacted in direct response to Rev. Rul. 75-266 and sought to alleviate the administrative burden which was first described in the Senate Report to the 1946 Amendment. Public Law 94-93's underlying purpose was discussed by several senators and congressmen prior to

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3. Id.

its enactment. For example, Senator Long, Chairman of the Senate Finance Committee, explained the change as follows:

The amendment deals with the method of assessing railroad retirement payroll taxes. It essentially restores the practice existing up until this year when a new revenue ruling [Rev. Rul. 75-266] interpreted the law to require that these taxes be assessed as of the period when the wages were actually earned. This revenue ruling creates an administrative burden on railroad employers and provides a taxing basis which is inconsistent with the basis under which the Railroad Retirement Board credits wages to employee accounts for benefit computation purposes. This amendment will make the two procedures consistent in that for both tax assessment and benefits computation purposes wages will be considered to be earned as of the period when they are actually paid except that the employee may, at his option, request [under subsection (e)(2)] that these determinations be made on the basis of when the wages were actually earned.[4]

Also of importance was the comment made by Representative Staggers which linked Pub. L. 94-93 with section 4(f) of the 1946 Amendment:

[T]he Internal Revenue Service has ruled in Revenue Ruling 75-266 ... that compensation is to be taxed under the Railroad Retirement Tax Act as of the period when earned irrespective of when it was paid. The bill would

4. Vol. 121 Cong. Record 26759 (Aug. 1, 1975).

amend the Railroad Retirement Act to clarify the intention originally expressed in 1946, that compensation is to be taxed only on an "as paid" basis.[5]

Senator Long's comments are further underscored by an exchange between Representatives Conable and Stieger on the House floor that same day:

Mr. CONABLE. .... Is it not true that this also does not act as a precedent in other areas, it relates only to Railroad Retirement and will not cause serious problems beyond the $10,000 revenue loss, which is estimated to be the total impact on the Treasury?

Mr. STIEGER. It is not a precedent. It is only an administrative change.[6]

These exchanges in the Senate and in the House of Representatives highlight two very important points about Pub. L. 94-93, both of which fully support the proposition that Pub. L. 94-93 did not act to exclude time-lost payments from the definition of compensation. First, the change from an earned basis to a paid basis was only an administrative change, not a substantive change. It was merely intended to deal with the administrative burdens described in the Senate Report to the 1946 Amendment. As alluded to in that report, shifting the statute's focus to a compensation paid basis only affected the administrative problem of when (not whether) time-lost payments

5. Vol. 121 Cong. Record 24479 (July 24, 1975).

6. Vol. 121 Cong. Record 27014 (August 1, 1975).

constitute compensation. By contrast, excluding time-lost pay from the definition of compensation would have been a very significant substantive change. Second, the colloquy between Representatives Conable and Stieger indicates that the estimated total impact of the amendment was $10,000. Obviously, if Congress had intended to specifically exclude time-lost pay from compensation, then it would have been readily apparent that the financial impact would have far exceeded Treasury's estimates. The difference between the two figures is too great to support the Company's position that time-lost payments were statutorily excluded from compensation and, therefore, from taxation. This relatively minuscule estimate of the revenue loss, coupled with the numerous assertions that the amendment was an administrative response to Rev. Rul. 75-266, further demonstrates that time-lost payments were still included within the definition of compensation after Pub. L. 94-93.

Having briefly examined section 3231(e)(1) of the Code as it existed prior to Pub. L. 94-93, the next relevant step is to actually examine the statutory changes achieved by Pub. L. 94-93. Exhibit A illustrates that Pub. L. 94-93 shifted the statute's focus from whether an item was "earned by an individual" to whether it was "paid to an individual." An example illustrates the difference between the two methods. Under the "as paid" method, if an employee receives time-lost payments in the current year attributable to services performed in a prior year, then the RRTA tax liabilities are computed using the tax rates and monthly compensation limits for the current year. By contrast, under the "as earned" method, the tax

liabilities would be computed using the prior year's tax rates and monthly compensation limits since that was the year in which the time-lost payments were earned.

As previously explained, the timing rule was inextricably tied to this "earned" concept. Consequently, the statute's substitution of the phrase "earned by an individual" with the phrase "paid to an individual" directly affected the need for and the continued viability of the special timing rule. The timing rule was no longer necessary once the general definition of compensation was amended to include items on a "paid basis" rather than on an "earned basis." Therefore, the need for the inclusion provision in subsection (e)(1) was also eliminated and no inference should be drawn that time-lost payments were intended to be excluded from compensation.

The fact that time-lost payments were still included within the general definition of "compensation" after Pub. L. 94-93 is further demonstrated by the fact that subsection (e)(2) continued to specifically refer to time lost.[7] The Company

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7. With respect to the years in issue, the definition of "compensation" for benefit purposes (section 231(h) of the Railroad Retirement Act ("RRA")) is similar to the definition for taxation purposes. One notable distinction is that section 231(h) continued to specifically include payments for time lost even after the references were omitted from section 3231(e) of the Code (*see* the emphasized language in Exhibit B). Obviously, Title 45 does not control Title 26 and vice versa. Nonetheless, the statutes are two sides of the same coin, *i.e.*, RRTA is the revenue side of the coin and RRA is the benefit/expenditure side. The courts are aware of this legislative interrelationship. *See Standard Office Building Corporation v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987);

apparently views this as a mere Congressional oversight. Such an argument might have some merit if the reference to time lost had been in a different subtitle or, at the very least, a different Code section. However, the Company's position lacks merit since (i) the reference was within the same Code section and (ii) Pub. L. 94-93 also extensively amended subsection (e)(2) without deleting the time-lost reference. If Congress had intended to exclude time-lost payments from compensation, then Pub. L. 94-93 would have clearly eliminated the reference in subsection (e)(2). The fact that Congress amended subsection (e)(2) without deleting the time-lost reference indicates that time-lost payments continued to be included in compensation after Pub. L. 94-93.

Although the Company's assertion only relates to Pub. L. 94-93, this analysis would not be complete without examining subsequent amendments to the definition of compensation. In this regard, two significant acts were adopted in 1981 and 1983. An examination of these two acts demonstrates that time-lost payments were not subsequently excluded from the definition of compensation.

The 1981 Act amended subsection (e)(2) by reinserting the sentence which had previously been deleted by Pub. L. 94-93 (the bracketed sentence in Exhibit A). Essentially,

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Florida East Coast Railway Company v. United States, 470 F.2d 513, 517 (Ct. Cl. 1972); *City of Galveston, Texas v. United States*, 22 Cl. Ct. 600, 610 (1991), *rev'd* 949 F.2d 404 (Fed. Cir. 1991). As such, it is incongruous to conclude that congress intended that benefits accrue for time-lost payments without a corresponding collection of taxes.

that introductory provision reestablished the rebuttable presumption that a payroll payment is compensation for the employee's services in the period with respect to which the payment is made. Section 31.3231(e)-1(a)(1) of the regulations provides that a "payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary to be compensation for services rendered by such individual as an employee of the employer." Obviously, this amendment and the regulations are significant since the Company's payments were apparently payroll payments. Even more significant is the Conference Report which states in pertinent part:

> The House bill also provides that, in the absence of evidence to the contrary ... payments by railroad employers shall be presumed to be compensation for services rendered as an employee in the period for which the payment is made, *an employee receiving retroactive wage payments (such as* lump sum retroactive wage payments and *crew consists payments) will be deemed under the provision to be compensation paid in the period for which the payment is made* unless the employee requests in writing (pursuant to existing provisions in sec. 3231(e)(2)) that such compensation was earned in a period other than the period in which it was paid."[8](emphasis added).

Crew consist payments resemble time-lost payments under both the Washington Agreement and the New York Dock Conditions, especially to the extent that they are paid for

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8. Conf. Rep. No. 97-215, 97th Cong., 1st Sess., p. 267 (1981).

periods in which no actual services are performed. The Conference Report leaves little doubt that these type of payments continued to constitute compensation after Pub. L. 94-93. The only question regarding these payments was when, not whether, they constitute compensation.

In one of the more extensive amendments affecting section 3231(e) of the Code, section 225 of the Railroad Retirement Solvency Act of 1983 ("1983 Act") deleted the former subsection (e)(2). As such, the last specific reference to pay for time lost was removed from section 3231(e).[9] Former subsection (e)(2) was replaced with provisions which: (i) exclude compensation in excess of the applicable base, (ii) define "applicable base," and (iii) provide for the applicability of successor employer provisions. This technical amendment was necessary to shift the definition of compensation from a monthly wage base to an annualized wage base.[10] In describing subsection (e)(2)'s deletion of the special timing provisions, the Committee Report simply stated that "compensation would be taxed when it is paid to the employee,"[11] *i.e.*, employees could no longer elect to deem payment in the period in which the compensation was earned. The 1983 Act's legislative history does not provide even the remotest

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9. The instructions to Form CT-1, Employer's Annual Railroad Retirement and Unemployment Repayment Tax Return, have been published virtually unchanged over a 25-year period. Those instructions have continued to include time-lost payments as compensation (even after Pub. L. 94-93 and the 1983 Act).

10. H. Rep. No. 98-30, 98th Cong., 1st Sess., p. 21 (1983).

11. Id. at 29.

indication that the 1983 Act intended to exclude time-lost payments from the definition of compensation. In fact, the extensive revenue loss caused by such an exclusion would have been in direct opposition to the 1983 Act's stated purpose "to improve the financial status of the Railroad Retirement System."[12]18

CONCLUSIONS

1. Revenue Ruling 77-347 is inapplicable to the separation payments since the payments disqualify the recipients from receiving railroad unemployment benefits. Therefore, the separation payments are "compensation" under section 3231(e)(1) of the Code.

2. Public Law 94-93 shifted the determination of compensation from an "as earned" basis to an "as paid" basis. Therefore, Pub. L. 94-93 only affected when, not whether, time-lost payments were included as compensation. The fact that Pub. L. 94-93 did not exclude time-lost payments from compensation is fully supported by the statute and the legislative history.

A copy of this Technical Advice Memorandum is to be given to the Company. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

EXHIBIT A

(e) Compensation.--For purposes of this chapter--

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12. Id. at 19.

Addendum

(1) The term "compensation" means any form of money remuneration [earned by] *paid to* an individual for services rendered as an employee to one or more employers [, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost] .... Compensation which is earned during the period for which the [Commissioner] *Secretary or his delegate* shall require a return of taxes under this [subchapter] *chapter* to be made and which is payable during the calendar month following such period shall be deemed to have been paid during such period only.

(2) [A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made.] *An employee shall be deemed to be paid compensation in the period during which such compensation is earned only upon a written request by such employee, made within six months following the payment, and at a showing that such compensation was earned during a period other than the period in which it was paid.* An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a

personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

EXHIBIT B

(h)(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers, or as an employee representative, *including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.* A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or if the employee establishes, subject to the provisions of section 231(h) of this title, the period during which such compensation will have been earned.

Addendum

(2) *An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.* (emphasis added).